

of corporate vehicles. The taxpayer is a retailer as that term is defined in sec. 77.51(13), Wis. Stats., because it is a person deriving rentals from the lease of tangible personal property. The amounts received by the taxpayer from employees as reimbursement for their personal use of the taxpayer's corporate vehicles are gross receipts as that term is defined in sec. 77.51(4)(a), Wis. Stats.

The arrangement between the taxpayer and its employees for the use and reimbursement for their personal use of the taxpayer's vehicles constitutes the rental of tangible personal property at retail to the taxpayer's employees. The rental of the taxpayer's corporate vehicles to its employees for their personal use is

not an occasional sale as that term is defined in sec. 77.51(9), Wis. Stats., because the rental of the corporate vehicles was neither isolated nor sporadic.

The taxpayer has not appealed this decision. □

Rebates; Sovereign immunity. *John Grall, et al. vs. Mark Bugher, Secretary of the Wisconsin Department of Revenue, et al.* (Circuit Court for Dane County, January 30, 1996). This case was remanded to the Circuit Court by the Wisconsin Supreme Court. The dispositive issue in this case is whether the department is immune from suit.

A summary of the Court of Appeals December 16, 1993 decision is contained in *Wisconsin Tax Bulletin* 90 (January 1995), page 24. The taxpayers appealed the Court of Appeals decision to the Wisconsin Supreme Court, which, on May 23, 1995, reversed the Court of Appeals decision and remanded the case to the Circuit Court.

The Circuit Court dismissed the matter, since the taxpayers have indicated that they wish to pursue their administrative remedies prior to pursuing any further action in the Circuit Court. Neither the taxpayer nor the department appealed the Circuit Court dismissal. □



Tax Releases

"Tax releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from

those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section

numbers are to the Wisconsin Statutes unless otherwise noted.

The following tax releases are included:

Individual Income Taxes

1. Carryforward of Historic Rehabilitation Credits by Claimants Subject to Alternative Minimum Tax (p. 29)
2. Eligibility for the Wisconsin Income Tax Exemption for Members of the Wisconsin State Teachers Retirement System (p. 30)

Corporation Franchise and Income Taxes

3. Assessment of Tax to Transferee of Dissolved Corporation (p. 31)

Sales and Use Taxes

4. Bovine Growth Hormone and Vitamins for Farm Livestock (p. 31)

Withholding of Taxes

5. Penalty for Intentional Failure to Remit Withholding Taxes (p. 32)

Motor Vehicle Fuel Taxes

6. Motor Vehicle Fuel Tax Discount (p. 33)

INDIVIDUAL INCOME TAXES

1 Carryforward of Historic Rehabilitation Credits by Claimants Subject to Alternative Minimum Tax

Statutes: Sections 71.07(9m) and (9r), 71.08, and 71.10(4), Wis. Stats. (1993-94), and as affected by 1995 Wisconsin Act 27

Note: This tax release supersedes the tax release with the same title that was published in *Wisconsin Tax Bulletin 95* (January 1996), page 30. Question and Answer 2 was added to clarify the computation of the carryforward when the individual has a regular Wisconsin income tax liability. In addition, the statutory references were updated to reflect the creation of additional development zones tax credits for taxable years beginning on or after January 1, 1995.

Background: Sections 71.07(9m) and (9r), Wis. Stats. (1993-94), provide for a supplement to the federal historic rehabilitation credit and a state historic rehabilitation credit, respectively. Each of these provisions provides for a 15-year carryforward of unused credits.

For individuals, sec. 71.10(4), Wis. Stats. (1993-94), and as amended by 1995 Wisconsin Act 27, requires computations to be made in the following order for taxable years beginning on or after January 1, 1995:

- (a) Income tax under sec. 71.06
- (b) Dependent credit and senior citizen credit under sec. 71.07(8)
- (c) Itemized deduction credit under sec. 71.07(5)
- (d) School property tax credit under sec. 71.07(9)
- (e) Supplement to federal historic rehabilitation credit under sec. 71.07(9m)
- (f) State historic rehabilitation credit under sec. 71.07(9r)
- (g) Alternative minimum tax under sec. 71.08

- (h) Married persons credit under sec. 71.07(6)
- (i) Enterprise zones jobs credit under sec. 71.07(2dj)
- (j) Enterprise zones sales tax credit under sec. 71.07(2ds)
- (k) Development and enterprise zones investment credit under sec. 71.07(2di)
- (l) Development and enterprise zones location credit under sec. 71.07(2dL)
- (m) Development and enterprise zones day care credit under sec. 71.07(2dd)
- (n) Development and enterprise zones environmental remediation credit under sec. 71.07(2de)
- (o) Payments to other states under sec. 71.07(7)

Section 71.08(1)(intro.), Wis. Stats. (1993-94), and as amended by 1995 Wisconsin Act 27, imposes an alternative minimum tax on individuals, estates, and trusts if the income tax under sec. 71.02, Wis. Stats., not considering the claim of right credit under sec. 71.07(1), development and enterprise zones day care, environmental remediation, investment, jobs, location, and sales tax credits under secs. 71.07(2dd), (2de), (2di), (2dj), (2dL), and (2ds), 71.28(1dd), (1de), (1di), (1dj), (1dL), and (1ds), and 71.47(1dd), (1de), (1di), (1dj), (1dL), and (1ds), farmers' drought property tax credit under secs. 71.07(2fd), 71.28(1fd), and 71.47(1fd), farmland tax relief credit under secs. 71.07(3m), 71.28(2m), and 71.47(2m), married persons credit under sec. 71.07(6), earned income tax credit under sec. 71.07(9e), homestead credit under subch. VIII, farmland preservation credit under subch. IX, and credit for taxes paid to other states under sec. 71.07(7), is less than the tax under sec. 71.08.

Facts and Question 1: Taxpayer A calculates a state historic rehabilitation tax credit of \$10,000 for 1995. The individual computes his 1995 Wisconsin tax liability as follows:

Income tax (gross tax)	\$ 4,000
Dependent credit	(100)
Itemized deduction credit	(300)
School property tax credit	(200)
State historic rehabilitation credit	<u>(3,400)</u>
Regular income tax	\$ 0
Tentative minimum tax	\$ 1,600
Alternative minimum tax	\$ 1,600

How much of Taxpayer A's 1995 historic rehabilitation credit is available to be carried forward to 1996?

Answer 1: Of Taxpayer A's \$10,000 1995 historic rehabilitation credit, \$8,200 is available to be carried forward to 1996.

Since the historic rehabilitation credit cannot offset the alternative minimum tax, the credit is considered utilized to the extent that Taxpayer A's regular income tax before subtracting the historic rehabilitation credit exceeds his tentative minimum tax. Thus, \$1,800 [\$4,000 gross tax - \$100 dependent credit - \$300 itemized deduction credit - \$200 school property tax credit - \$1,600 tentative minimum tax = \$1,800] of the historic rehabilitation credit is utilized in 1995, and \$8,200 [\$10,000 - \$1,800] may be carried forward.

Facts and Question 2: Taxpayer B calculates a state historic rehabilitation tax credit of \$3,800 for 1995. The individual computes her 1995 Wisconsin tax liability as follows:

Income tax (gross tax)	\$ 5,000
Itemized deduction credit	(515)
School property tax credit	(200)
State historic rehabilitation credit	<u>(3,800)</u>
Regular income tax	\$ 485
Tentative minimum tax	\$ 2,225
Alternative minimum tax	\$ 1,740

How much of Taxpayer B's 1995 historic rehabilitation credit is available to be carried forward to 1996?

Answer 2: Of Taxpayer B's \$3,800 1995 historic rehabilitation credit, \$1,740 is available to be carried forward to 1996.

Since the historic rehabilitation credit cannot offset the alternative minimum tax, the credit is considered utilized to the extent that Taxpayer B's regular income tax before subtracting the historic rehabilitation credit exceeds her tentative minimum tax. Thus, \$2,060 [\$5,000 gross income tax - \$515 itemized deduction credit - \$200 school property tax credit - \$2,225 tentative minimum tax = \$2,060] of the historic rehabilitation credit is utilized in 1995, and \$1,740 [\$3,800 - \$2,060] may be carried forward. □

2 Eligibility for the Wisconsin Income Tax Exemption for Members of the Wisconsin State Teachers Retirement System

Note: This tax release supersedes the tax release with the same title, which was published in *Wisconsin Tax Bulletin 76* (April 1992), page 9. The original tax release has been revised to reference an additional relevant court decision rendered in 1994 (i.e., the Wisconsin Court of Appeals decision in *Benson vs. Gates*). The taxable treatment prescribed for the retirement benefits in Bulletin 76 is not changed by this tax release.

Statutes: Section 71.05(1)(a), Wis. Stats. (1993-94)

Background: Section 71.05(1)(a), Wis. Stats. (1993-94), provides that all payments received from certain retirement systems are exempt from Wisconsin income tax if the pay-

ments are paid on the account of a person who was a member of, or who was retired from, one of the specified retirement systems as of December 31, 1963. One of the specified retirement systems is the Wisconsin State Teachers Retirement System which is administered by the Department of Employee Trust Funds (DETF).

Section 42.242(5), Wis. Stats. (1965-66), provides that a member of the State Teachers Retirement System who has ceased to be employed as a teacher may, under certain conditions, withdraw the member's deposits made while a member of the combined group based on teacher service performed after June 30, 1957. Members making such withdrawals forfeited the employer contributions.

DETF considered a withdrawal under sec. 42.242(5), Wis. Stats. (1965-66), to completely close the teacher's account.

However, in the case of *Schmidt v. Department of Employee Trust Funds*, 148 Wis. 2d 844 (Ct. App. 1989), aff'd. 153 Wis. 2d 35 (1990), the court decided that a teacher who returned to teaching after 1963 was eligible for creditable service under sec. 42.245(1)(c), Wis. Stats. (1965-66). This section reduces by one-half the number of years of creditable service when the teacher previously withdrew required member deposits. Therefore, the account of a member making a sec. 42.242(5) withdrawal should not have been completely closed. One-half of the creditable service should have remained in the account, even though there were no contributions remaining in the account to fund a benefit.

Under sec. 40.08(10), Wis. Stats. (1993-94), there is a 7-year statute of limitations on corrections to a member's account. Because of this

statute of limitations provision, DETF believed that the *Schmidt* decision only affected individuals who submitted a written challenge to DETF's annual retirement account statement containing the DETF summary of the amount of creditable service within seven years of first having notice of DETF's failure to grant credit for previous service.

In 1994, in the case of *Benson vs. Gates* (188 Wis. 2d 389), the Wisconsin Court of Appeals held that the statute of limitations under sec. 40.08(10) does not commence until the date DETF calculates and pays retirement benefits to a plan beneficiary. As a result of the *Benson* decision, additional individuals are able to have their accounts in the retirement system corrected under the principles set forth in the *Schmidt* case.

Facts and Question: Prior to 1964, a teacher withdrew his deposits in the Wisconsin State Teachers Retirement System as allowed by sec. 42.242(5), Wis. Stats. (1965-66). His account in the retirement system was closed by DETF. The individual returned to teaching in 1964. The individual timely appealed the loss of creditable service to the Department of Employee Trust Funds. As a result of the *Schmidt* and *Benson* decisions, this individual's account was corrected to include one-half of the pre-1964 creditable service forfeited through the withdrawal.

Are the retirement benefits received by this individual exempt from Wisconsin tax?

Answer: Yes. Because of the restoration of one-half of this pre-1964 creditable service, this individual is deemed to have been a member of the Wisconsin Teachers Retirement System as of December 31, 1963. Therefore, payments received by this individual from the Wisconsin State

Teachers Retirement System qualify for the exemption provided by sec. 71.05(1)(a), Wis. Stats. (1993-94).

Note: The Wisconsin Tax Appeals Commission decision, in the *James R. and Zoe E. Connor vs. Wisconsin Department of Revenue* case, involved a fact situation very similar to what is presented in this tax release. However, that decision does not affect the department's position regarding the taxable status of retirement benefits as expressed in this tax release.

(Editor's Note: See page 16 of this Bulletin for a summary of the Connor decision.) □

CORPORATION FRANCHISE AND INCOME TAXES

3 Assessment of Tax to Transferee of Dissolved Corporation

Statutes: Sections 71.74(7) and (12) and 71.82(1)(a) and (2)(a), Wis. Stats. (1993-94)

Background: Section 71.74(7), Wis. Stats. (1993-94), provides that if all or substantially all of the business or property of a corporation is transferred to one or more persons and the corporation is liquidated, dissolved, merged, consolidated, or otherwise terminated, any tax imposed under Chapter 71 (income and franchise taxes) on such corporation may be assessed and collected against the transferee or transferees of such business or property.

Section 71.74(12), Wis. Stats. (1993-94), provides that additional income or franchise taxes assessed under sec. 71.74(7), Wis. Stats. (1993-94), shall become delinquent if not paid on or before the due date stated in the notice to the taxpayer.

Section 71.82(1)(a), Wis. Stats. (1993-94), provides that in assessing taxes, interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid. Section 71.82(2)(a), Wis. Stats. (1993-94), provides that delinquent income and franchise taxes shall be subject to interest at the rate of 1.5% per month (18% per year) until paid.

Facts and Question: In August 1994, the department issues a notice of assessment to Corporation A showing \$5,000 of additional tax due from its 1993 franchise tax return and \$300 of regular interest (12% per year) computed from the due date of the return to the due date stated on the notice of assessment. Corporation A does not pay the amount due and the assessment becomes delinquent. The assessment is then subject to delinquent interest (18% per year).

Corporation A dissolves in January 1996. All assets of Corporation A are transferred to the sole shareholder at that time. In March 1996, the department issues an assessment to the shareholder, as transferee of the dissolved corporation, for the delinquent tax owed by Corporation A. At the time of the assessment, Corporation A owes the department \$6,700 (tax of \$5,000, regular interest of \$300, and delinquent interest of \$1,400).

May the department issue a notice of assessment to the transferee for the entire \$6,700 owed to the department by Corporation A?

Answer: No. Under sec. 71.74(7), Wis. Stats. (1993-94), the transferee may not be charged delinquent

interest until after the due date stated in a notice of assessment issued to the transferee. Therefore, the department may issue a notice of assessment to the transferee for \$5,000 (tax due from the 1993 corporate franchise tax return) plus regular interest (12% per year) computed from the due date of Corporation A's 1993 franchise tax return to the due date stated on the notice of assessment to the transferee. The transferee may be charged delinquent interest only if the amount due is not paid on or before the due date stated on the notice of assessment to the transferee. □

SALES AND USE TAXES

4 Bovine Growth Hormone and Vitamins for Farm Livestock

Statutes: Section 77.54(33) and (34), Wis. Stats. (1993-94)

Wis. Adm. Code: Section Tax 11.12(2)(e) and (k), April 1993 Register

Background: Section 77.54(33), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for medicines used on farm livestock, not including workstock.

"Farm livestock medicine" is defined in sec. Tax 11.12(2)(e), Wis. Adm. Code, to mean any substance or preparation intended for use by external or internal application to farm livestock in the cure or treatment of disease and which is commonly recognized by veterinarians as a substance or preparation intended for that use. "Farm livestock medicine" does not include vitamins.

Section 77.54(34), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for

milk house supplies used exclusively in producing and handling milk on dairy farms.

“Milk house supplies” is defined in sec. Tax 11.12(2)(k), Wis. Adm. Code, to mean items used exclusively in producing and handling milk on dairy farms, including milk filters, soaps, detergents, udder washer and balms, pipeline cleaners, manual cleaners, acid cleaners, disinfectants and sanitizers, teat dips, teat dilators, paper towels, insect strips, cloth udder towels, udder sponges, brushes and brooms, window cleaners, and water softener salt.

Question 1: Is the sale of a bovine growth hormone to persons engaged in farming, which is injected in dairy cows to enhance milk production, subject to Wisconsin sales or use tax?

Answer 1: Yes. The sale of a bovine growth hormone is subject to Wisconsin sales or use tax.

The exemption for farm livestock medicine under sec. 77.54(33), Wis. Stats. (1993-94), does not apply because a bovine growth hormone is not used for the cure or treatment of disease.

The exemption for milk house supplies under sec. 77.54(34), Wis. Stats. (1993-94), does not apply. The statute requires that the supply (e.g., bovine growth hormone) must be used exclusively in both producing **and** handling milk. A bovine growth hormone is not used in **handling** milk and, therefore, the requirements for exemption have not been met.

Question 2: Is the sale of vitamins to persons engaged in farming, which are given to dairy cows, subject to Wisconsin sales or use tax?

Answer 2: Yes. The sale of vitamins is subject to Wisconsin sales or use tax.

The exemption for farm livestock medicine under sec. 77.54(33), Wis. Stats. (1993-94), does not apply because vitamins are specifically excluded from the definition of “farm livestock medicine” in sec. Tax 11.13(2)(e), Wis. Adm. Code.

The exemption for milk house supplies under sec. 77.54(34), Wis. Stats. (1993-94), does not apply to vitamins for the following reasons:

- A. Vitamins are intended to improve the overall health of dairy cows, which not only could result in improved milk production, but also in better breeding and lower medical costs. Therefore, vitamins are not used **exclusively** in milk production.
- B. Vitamins are not used in **handling** milk.

WITHHOLDING OF TAXES

5 Penalty for Intentional Failure to Remit Withholding Taxes

Statutes: Section 71.83(1)(b)2, Wis. Stats. (1993-94)

Background: Section 71.83(1)(b), Wis. Stats. (1993-94), provides various civil penalties which may be imposed for “intent to defeat or evade” taxes. Under sec. 71.83(1)(b)2, Wis. Stats., any person who is “required to withhold, account for or pay over any tax imposed” by ch. 71, Wis. Stats. (income and franchise taxes), and who intentionally fails to do one or more of those actions, is liable to a penalty equal to the total amount of the tax (100% penalty), plus interest

and penalties on the tax that is not withheld, collected, accounted for, or paid to the department.

In ch. 71, Wis. Stats. (including sec. 71.83(1)(b)2, Wis. Stats.), “person” includes corporations, unless the context requires otherwise. Section 71.22(9), Wis. Stats. (1993-94). Section 71.83(1)(b)2, Wis. Stats., further provides that “person” includes (but is not limited to) an officer, employe, or other responsible person of a corporation or other form of business association, or a member, employe, or other responsible person of a partnership, limited liability company, or sole proprietorship, who as that officer, member, employe, or other responsible person, has a duty to withhold or account for the tax or to pay the tax to the department.

Facts and Question 1: ABC Corporation, a Wisconsin corporation engaged in business in Wisconsin, paid wages to its employes and withheld Wisconsin taxes from their wages during its entire taxable year 1994. Taxpayer X was the corporation’s president, and he had primary responsibility for remitting the withholding taxes to the Wisconsin Department of Revenue. Because of cash-flow problems, however, Taxpayer X intentionally failed to remit the taxes to the department. Instead, he used the amounts withheld from employes’ wages to pay other bills.

In an audit of ABC Corporation, the department determined that the amount of withholding tax which should have been remitted to the department, but was not remitted, was \$10,000. The department will assess ABC Corporation for the \$10,000.

Does the department have the authority under sec. 71.83(1)(b)2, Wis.

Stats. (1993-94), to add the 100% penalty to the \$10,000 of taxes in its assessment against ABC Corporation?

Answer 1: Yes. The language of sec. 71.83(1)(b)2, Wis. Stats. (1993-94), allows the imposition of the 100% penalty against ABC Corporation. The corporation is a “person required to withhold, account for or pay over” the taxes withheld from the wages of its employees. Since ABC Corporation intentionally did not “pay over” the taxes to the department, it is subject to the 100% penalty.

Facts and Question 2: Based on the facts in Facts and Question 1, the department assessed ABC Corporation for the \$10,000 of withholding taxes, a \$10,000 penalty under sec. 71.83(1)(b)2, Wis. Stats. (1993-94), and interest computed to the due date shown on the notice of amount due. ABC Corporation neither contested nor paid the assessment, and the amount due became delinquent. Since Taxpayer X, the corporation’s president, is a “responsible person” under the “personal liability” provisions of sec. 71.83(1)(b)2, Wis. Stats., the department intends to assess Taxpayer X personally.

May the department include the \$10,000 penalty assessed against ABC Corporation in its assessment against Taxpayer X?

Answer 2: Yes. Taxpayer X is a person who had a duty to pay over the withholding tax to the department and intentionally failed to do so. Section 71.83(1)(b)2, Wis. Stats., the same provision that allows the imposition of the 100% penalty on the corporation, also allows the department to assess the tax, interest, and penalties against Taxpayer X personally. The department may assess Taxpayer X for \$20,000 (\$10,000 taxes plus \$10,000 penalty), plus interest. □

MOTOR VEHICLE FUEL TAXES

6 Motor Vehicle Fuel Tax Discount

Statutes: Section 78.12(4) and (5)(a), Wis. Stats. (1993-94)

Note: This tax release applies to motor vehicle fuel tax discounts on gasoline received by a licensed supplier on or after April 1, 1994.

Background: Section 78.12(4), Wis. Stats. (1993-94), allows licensed suppliers to reduce the number of gallons of gasoline received by 1.35% to determine the number of gallons on which motor vehicle fuel tax must be paid. This results in a 1.35% tax discount. Section 78.12(5)(a), Wis. Stats. (1993-94), provides that a supplier must credit a wholesaler distributor’s account for a 1.25% tax discount when the distributor pays to the supplier the motor vehicle fuel tax on gasoline it has purchased from the supplier. Suppliers may retain the other 0.1% portion of the discount (1.35% - 1.25% = 0.1%). Suppliers must pay the tax to the department by the 15th day of the month, for gasoline received during the previous month.

Question: Is a licensed supplier entitled to the 1.35% gasoline tax discount provided by sec. 78.12(4), Wis. Stats. (1993-94), regardless if the payment of tax is made (1) by the due date for payment to the department, or (2) after the due date?

Answer: Yes. The statutes do not prohibit the discount if the tax is not paid by the due date in sec. 78.12(5)(a), Wis. Stats. (1993-94). (**Note:** Late payments are subject to late fees and interest.) □